Work in Progress / Travaux en cours

Research on Evidence in Arbitral Proceedings

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My doctoral thesis focuses on evidence in commercial arbitration proceedings, especially as to the Dutch arbitration practice. In proceedings before an arbitral tribunal, as before a State court, evidence is of crucial importance. In general, the parties are required to prove their assertions; the arbitrators must weigh the evidence in making their award. While the autonomy of the parties is one of the basic assumptions in arbitration, it is of particular interest to know in what way arbitrators may or should function in the course of the procedure, especially with regard to evidence, because in practice parties do not generally agree on rules in this respect. The role of the arbitral tribunal under different arbitration acts and arbitration rules is not usually a subject of extensive research. The international literature on evidence tends to focus on the traditional distinction between the inquisitorial and adversarial systems of obtaining evidence, in general not looking at the manner provisions on evidence are formulated.

My thesis research concentrates on the tasks and powers of the arbitral tribunal with respect to evidence, as opposed to the rights of the parties on this particular topic. The points of discussion include such subjects as documentary evidence, evidence by witnesses and experts (including expert witnesses) and site inspection. I expect my study to provide answers to such questions as for example: Who can take the initiative to obtain documentary evidence, and call witnesses and experts? Who examines the witnesses, and what to do with recalcitrant witnesses? I deal with both domestic and international arbitration, and examine various arbitration acts and arbitration rules.

As I am writing this study – in Dutch – from a Dutch point of view, a large portion of the research is devoted to the 1986 Netherlands Arbitration Act, which is codified in Articles 1020–1076 of the Code of Civil Procedure. In general, Dutch scholarly writing on arbitration has not paid much attention to evidence. My research is comparative and thus Dutch law is compared to other arbitration acts. This type of comparative approach could be of particular use to the legislator, as it is interesting to see what Dutch arbitration practice might learn from arbitration practice abroad. Such an approach was indeed used by the drafters of the 1986 Netherlands Arbitration Act. In addition to the Dutch legislation, I have selected fairly new and important legislative acts, including

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those of Switzerland (1969, 1989) and England (1996). No such research would be complete without reference to the 1985 UNCITRAL Model Law, which has successfully served as a model for a number of jurisdictions.

Arbitration legislation, including the above-mentioned acts, does not generally contain extensive evidentiary provisions. This does not, however, mean that there are no differences among the various acts. The Netherlands Arbitration Act and the English Arbitration Act are somewhat more detailed, while the Swiss Private International Law Act is less so. In any case, all acts give the arbitrators a degree of discretionary power. Unless the parties agree otherwise, for example, the arbitral tribunal is not obliged to apply the strict rules of evidence applicable in state court proceedings. The arbitral tribunal must, however, in all cases, take full account of the mandatory rules of the applicable arbitration act.

All the arbitration acts, even the more extensive ones, leave room for the parties to agree on (or for the arbitrators to refer to) pre-established procedural rules, whether or not associated with a particular arbitral institution. My research includes several sets of arbitration rules, including the 1998 Rules of the Netherlands Arbitration Institute (NAI), the 1998 International Chamber of Commerce Rules of Arbitration (ICC), the 1998 Rules of the London Court of International Arbitration (LCIA), and the 1976 UNCITRAL Arbitration Rules. Most interesting in this context are the LCIA Rules which, together with the NAI Rules, form an example of very detailed arbitration rules, especially with respect to evidence. Although arbitration rules often contain more detailed procedural provisions than the legislation applicable to the proceedings, in no case may they derogate from the mandatory rules of the applicable arbitration act.

One interesting distinction between the 1986 Netherlands Arbitration Act and the 1996 English Arbitration Act, is the determination of which provisions are mandatory. Both acts have rather detailed procedural provisions. In the 1986 Netherlands Arbitration Act, the arbitrators and parties are obliged to follow the mandatory provisions of Art. 1039 (a general provision on evidence), Art. 1041 (on witnesses) and Art. 1042 (on experts appointed by the arbitral tribunal); the parties generally cannot deviate from the procedure specified in those articles. As a result there is a greater likelihood that at least some part of the agreed arbitration rules will contravene mandatory articles of the Netherlands Arbitration Act.

While the 1996 English Arbitration Act also contains extensive provisions on procedural and evidential matters, parties retain the right to agree otherwise (see, e.g., Arts. 34 and 37). Under the 1996 English Arbitration Act, the parties may agree in nearly all respects on the course of the arbitral proceedings. This illustrates the difference between the Dutch arbitration law as an exponent of the inquisitorial method of obtaining evidence, and the English arbitration law as an exponent of the adversarial method.